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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ASUS COMPUTER INTERNATIONAL; and)
 ASUSTEK COMPUTER INCORPORATED)
)
 Plaintiffs,)
)
 v.)
)
 INTERDIGITAL, INC.; INTERDIGITAL)
 COMMUNICATIONS, INC.;)
 INTERDIGITAL TECHNOLOGY)
 CORPORATION; IPR LICENSING, INC.; and)
 INTERDIGITAL PATENT HOLDINGS, INC.,)
)
 Defendants.)

Case No.: 15-cv-1716 (BLF)

**DEFENDANTS' NOTICE OF
 MOTION AND MOTION TO
 EXCLUDE OPINIONS AND
 TESTIMONY OF:**

- 1. APOSTOLOS K. "PAUL" KAKAES;**
- 2. FIONA M. SCOTT MORTON;**
- AND**
- 3. GREGORY K. LEONARD**

Hearing date: February 14, 2019
 Time: 9:00 a.m.
 Judge: Hon. Beth Labson Freeman

PUBLIC

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. APPLICABLE LAW.....	3
III. THE COURT SHOULD EXCLUDE DR. KAKAES’ FLAWED OPINIONS	5
A. Dr. Kakaes Offers Fatally Flawed Opinions on Two Topics	5
1. [REDACTED]	5
2. [REDACTED]	7
B. Both of Dr. Kakaes’ Opinions Are Unreliable and Should Be Excluded	8
1. Dr. Kakaes’ Opinions on [REDACTED] [REDACTED] Lack Foundation and Are Unreliable.....	8
a) Dr. Kakaes did not perform [REDACTED] analysis and did not supervise much of [REDACTED] work.....	8
b) [REDACTED] essentiality analysis is un-reproducible.	10
c) Dr. Kakaes fails to provide “the basis and reasons” for his census and essentiality opinions as well as [REDACTED] [REDACTED], as required by Rule 26(a)(2)(B)(i).	11
2. Dr. Kakaes’ Opinions Regarding [REDACTED] [REDACTED] Lack Basis and Are Unreliable	13
IV. THE COURT SHOULD EXCLUDE DR. SCOTT MORTON’S IMPROPER LEGAL OPINIONS	15
A. Dr. Scott Morton’s Legal Conclusions Regarding ASUS’s Breach of Contract Claims Should Be Excluded	15
B. Dr. Scott Morton’s Legal Conclusions Regarding ASUS’s Sherman Act Claim Should Be Excluded	17
V. THE COURT SHOULD EXCLUDE DR. LEONARD’S IMPROPER LEGAL OPINIONS	18

TABLE OF AUTHORITIES

CASES

<i>Abrams v. Ciba Specialty Chemicals Corp.</i> , No. 08-cv-0068-WS-B., 2010 WL 779283 (S.D. Ala. Mar. 2, 2010).....	9
<i>Aguilar v. Int’l Longshoremen’s Union Local No. 10</i> , 966 F.2d 443 (9th Cir. 1992)	5
<i>Arista Networks, Inc. v. Cisco Sys. Inc.</i> , Case 5:16-cv-00923-BLF, Dkt. 334 (N.D. Cal. June 15, 2018).....	18
<i>BladeRoom Grp. Ltd. v. Facebook, Inc.</i> , No. 5:15-cv-01370-EJD, 2018 WL 1611835 (N.D. Cal. Apr. 3, 2018).....	3
<i>Cholakyan v. Mercedes-Benz USA, LLC</i> , 281 F.R.D. 534 (C.D. Cal. 2012)	9, 10
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	1, 3, 10
<i>Daubert v. Merrell Dow Pharms.</i> , 43 F.3d 1311 (9th Cir. 1995)	14
<i>Eveler v. Ford Motor Co.</i> , No. 16-14776, 2017 WL 3382460 (E.D. La. Aug. 7, 2017).....	10
<i>Gen. Elec. Co. v. Joiner</i> , 522 U.S. 136 (1997).....	3, 14
<i>Hangartner v. Provident Life and Accident Ins. Co.</i> , 373 F.3d 998 (9th Cir. 2004).....	4
<i>In re Delta/AirTran Baggage Fee Antitrust Litig.</i> , 245 F. Supp. 3d 1343 (N.D. Ga. Mar. 28, 2017), <i>aff’d</i> , 714 F. App’x 986 (11th Cir. 2018)	4
<i>In re Roundup Prods. Liab. Litig.</i> , No. 16-md-02741-VC, 2018 WL 3368534 (N.D. Cal. July 10, 2018)	3, 8
<i>In re Silicone Gel Breast Implants Prods. Liab. Litig.</i> , 318 F. Supp. 2d 879 (C.D. Cal. 2004)	3
<i>In re W. Liquid Asphalt Cases</i> , 487 F.2d 191 (9th Cir. 1973).....	18
<i>K&N Eng’g, Inc. v. Spectre Performance</i> , No. EDCV 09-1900VAP, 2011 WL 13131157 (C.D. Cal. May 12, 2011).....	10
<i>Karum Holdings LLC v. Lowe’s Cos.</i> , No. 15 C 380, 2017 U.S. Dist. LEXIS 192269 (N.D. Ill. Nov. 21, 2017)	9
<i>Kilpatrick v. Breg, Inc.</i> , 613 F.3d 1329 (11th Cir. 2010).....	13
<i>Lawrence v. Raymond Corp.</i> , No. 09-cv-1067, 2011 U.S. Dist. LEXIS 85798 (N.D. Ohio Aug. 4, 2011), <i>aff’d</i> , 501 F. App’x 515 (6th Cir. 2012).....	13
<i>Mannick v. Kaiser Found. Health Plan, Inc.</i> , No. C 03-5905, 2006 WL 1626909 (N.D. Cal. June 9, 2006).....	4

1	<i>Microsoft Corp. v. Motorola, Inc.</i> , No. C10-1823, 2013 WL 4008822 (W.D. Wash. Aug. 5, 2013).....	4, 5, 16, 18, 19
2		
3	<i>Nationwide Trans. Fin. v. Cass Info. Sys., Inc.</i> , 523 F.3d 1051 (9th Cir. 2008)	4
4	<i>Nimely v. City of N.Y.</i> , 414 F.3d 381 (2d Cir. 2005)	4
5	<i>Owens v. Republic of Sudan</i> , 864 F.3d 751 (D.C. Cir. 2017)	4
6	<i>Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach</i> , 730 F.3d 1142 (9th Cir. 2013)	18
7		
8	<i>Paddack v. Dave Christensen, Inc.</i> , 745 F.2d 1254 (9th Cir. 1984)	3
9	<i>TCL Commc’n Tech. Holdings, Ltd., et al. v. Telefonaktiebolaget LM Ericsson, et al.</i> , Case No. 8:14-cv-00341 (C.D. Cal. Sept. 14, 2018).....	14
10	<i>Turpin v. Merrell Dow Pharms., Inc.</i> , 959 F.2d 1349 (6th Cir. 1992).....	14
11	<i>United States v. Hermanek</i> , 289 F.3d 1076 (9th Cir. 2002).....	10
12	<i>United States v. Johnson</i> , 875 F.3d 1265 (9th Cir. 2017)	13
13	<i>United States v. Shafi</i> , No. 15-cr-00582-WHO-1, 2018 WL 3159769 (N.D. Cal. June 28, 2018)	4, 13
14		
15	<i>Wilderness Dev., LLC v. Hash</i> , No. CV 08-54-M-JCL., 2009 WL 564224 (D. Mont. Mar. 5, 2009).....	11

RULES

17	Fed. R. Civ. P. 26	9, 11, 12
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Table of Abbreviations

InterDigital	Defendants InterDigital, Inc., InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc., and InterDigital Patent Holdings, Inc.
ASUS	Plaintiffs ASUS Computer International and Asustek Computer Incorporated
ETSI	European Telecommunications Standards Institute, a standards development organization
FRAND	Fair, Reasonable and Non-Discriminatory
SEP	Standards Essential Patent
UE	User Equipment (<i>e.g.</i> , mobile devices like cellular phones)
2G	Second Generation (of cellular technology)
3G	Third Generation (of cellular technology)
4G	Fourth Generation (of cellular technology)

Exhibits cited as “Ex. ____” are exhibits to the Declaration of Matthew R. Reed, filed concurrently herewith.

PLEASE TAKE NOTICE that on February 14, 2019 at 9:00 am in the U.S. District Court for the Northern District of California, Courtroom 3, 280 South First Street, San Jose, InterDigital shall and hereby does move for an order excluding certain opinions and testimony of ASUS experts Apostolos K. “Paul” Kakaes, Fiona M. Scott Morton and Gregory K. Leonard.

Issue to be decided: Whether certain opinions and testimony of ASUS’s experts meet the standards set by the Federal Rules of Evidence and the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).¹

I. INTRODUCTION

InterDigital respectfully requests that this Court exercise its gatekeeping authority as outlined in Federal Rule of Evidence 702 and *Daubert* to exclude certain opinions and testimony of three of ASUS’s experts: (1) Apostolos K. “Paul” Kakaes; (2) Fiona M. Scott Morton; and (3) Gregory K. Leonard. District courts rightfully exclude an expert’s opinions where, among other things, the expert: has not done his or her own analysis (or even supervised the analysis), but instead parrots the opinions of others; proffers opinions that lack sufficient basis to be reliable; makes conclusory and unsupported extrapolations from a small, non-representative sample; or offers legal opinions under the guise of expert opinions, seeking to testify as to ultimate issues in the case.

Dr. Kakaes offers flawed opinions on two topics which should be stricken: [REDACTED]

[REDACTED] For the first topic, Dr. Kakaes did not perform any of the essentiality analysis himself, and did not even supervise a large portion of it. [REDACTED]

[REDACTED] Further, the proffered analysis is unreliable because it is not repeatable; [REDACTED]

And

¹ Attached as Exhibits 1-5 are versions of the expert reports that are the subject of this motion, with blue and green highlights indicating the portions of the reports that InterDigital requests be excluded.

1 Dr. Kakaes failed to provide the basis and reasons for the conclusions [REDACTED]

2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]

11 Dr. Scott Morton offers improper opinions reflecting her legal conclusions relating to
 12 ASUS's antitrust and breach of contract claims against InterDigital. Specifically, she opines
 13 (1) [REDACTED]
 14 (2) that InterDigital has violated the "fair" and "reasonable" components of InterDigital's
 15 commitments to the European Telecommunications Standardization Institute ("ETSI") regarding
 16 licensing standards essential patents ("SEPs") on FRAND terms and conditions; (3) that
 17 InterDigital has discriminated against ASUS in violation of its FRAND commitments to ETSI;
 18 (4) that ASUS is a "willing licensee"; (5) that InterDigital has acquired monopoly power in the
 19 Cellular Technology Markets; (6) that InterDigital's conduct has caused anticompetitive harm to
 20 ASUS and consumers; and (7) [REDACTED] Such
 21 subject matters, which concern legal opinions and ultimate issues for the jury to resolve, are
 22 solely within the province of the Court, are not the proper subject of expert testimony, and should
 23 be excluded under Rule 702.

24 Dr. Leonard similarly offers improper legal opinions and conclusions concerning
 25 InterDigital's compliance with FRAND obligations. [REDACTED]

26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED] This proposed testimony

1 should be excluded, as it goes to ultimate issues for the jury and thus invades the province of the
2 Court.

3 **II. APPLICABLE LAW**

4 Before an expert may testify before a jury, the district court must act as a “gatekeeper” and
5 screen the expert’s testimony under the standards set by the Federal Rules of Evidence and the
6 Supreme Court’s decision in *Daubert*. To be admissible under Federal Rule of Evidence 702, an
7 expert’s opinion testimony must be “based on sufficient facts or data,” and be “the product of
8 reliable principles and methods,” and the expert must have “reliably applied the principles and
9 methods to the facts of the case.” *In re Roundup Prods. Liab. Litig.*, No. 16-md-02741-VC, 2018
10 WL 3368534, at *4 (N.D. Cal. July 10, 2018) (citation omitted). There are two key questions “at
11 the heart of the admissibility determination: whether the testimony is relevant and whether it is
12 reliable.” *Id.*; *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 318 F. Supp. 2d 879, 890
13 (C.D. Cal. 2004). “The focus of the reliability inquiry is on the principles and methodology an
14 expert uses in forming his opinions rather than the expert’s conclusions.” *In re Roundup*, 2018
15 WL 3368534, at *5. The goal here is to “prevent[] shoddy expert testimony and junk science
16 from reaching the jury.” *BladeRoom Grp. Ltd. v. Facebook, Inc.*, No. 5:15-cv-01370-EJD, 2018
17 WL 1611835, at *1 (N.D. Cal. Apr. 3, 2018) (citation omitted). The Court must also consider
18 whether, for a given conclusion, “there is simply too great an analytical gap between the data and
19 the opinion proffered.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). “[N]othing in either
20 *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that
21 is connected to existing data only by the *ipse dixit* of the expert.” *Id.* “In short, both unsound
22 methods and unjustified extrapolations from existing data can require the Court to exclude an
23 expert.” *In re Roundup*, 2018 WL 3368534, at *5.

24 While “Rule 703 permits . . . hearsay, or other inadmissible evidence, upon which an
25 expert properly relies, to be admitted to explain the basis of the expert’s opinion,” “[i]t does not
26 allow the admission of the reports to establish the truth of what they assert.” *Paddack v. Dave*
27 *Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984). In other words, “[a]n expert may not
28 serve ‘simply as a conduit for introducing hearsay under the guise that the testifying expert used

1 the hearsay as the basis of his testimony.” *United States v. Shafi*, No. 15-cr-00582-WHO-1,
 2 2018 WL 3159769, at *5 (N.D. Cal. June 28, 2018) (quoting *Owens v. Republic of Sudan*, 864
 3 F.3d 751, 789 (D.C. Cir. 2017)).

4 Under Federal Rule of Evidence 702, “an expert witness cannot give an opinion as to her
 5 legal conclusion, i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to
 6 the applicable law is the distinct and exclusive province of the court.” *Nationwide Trans. Fin. v.*
 7 *Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (quoting *Hangartner v. Provident Life*
 8 *and Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004); see also *Mannick v. Kaiser Found.*
 9 *Health Plan, Inc.*, No. C 03-5905, 2006 WL 1626909, at *17 (N.D. Cal. June 9, 2006) (an
 10 expert’s testimony may not “interpret[] the law for the court or . . . advis[e] the court about how
 11 the law should apply to the facts of a particular case”). Such expert testimony “usurps either the
 12 role of the trial judge in instructing the jury as to the applicable law or the role of the jury in
 13 applying that law to the facts before it,” *Nimely v. City of N.Y.*, 414 F.3d 381, 397 (2d Cir. 2005)
 14 (citation omitted), and “by definition does not aid the jury in making a decision; rather, it
 15 undertakes to tell the jury what result to reach, and thus attempts to substitute the expert’s
 16 judgment for the jury’s.” *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d
 17 1343, 1362-63 (N.D. Ga. Mar. 28, 2017), *aff’d*, 714 F. App’x 986 (11th Cir. 2018) (citation
 18 omitted).

19 While Federal Rule of Evidence 704 provides that “[a]n opinion is not objectionable just
 20 because it embraces an ultimate issue,” the Ninth Circuit has made clear that testimony that
 21 “merely tells the jury what result to reach is not sufficiently helpful to the trier of fact to be
 22 admissible.” *Nationwide Trans. Fin.*, 523 F.3d at 1060; see also *Microsoft Corp. v. Motorola,*
 23 *Inc.*, No. C10-1823, 2013 WL 4008822, at *12 (W.D. Wash. Aug. 5, 2013) (“Where the jury is
 24 in as good a position as the expert to draw conclusions from the evidence, and is capable of
 25 drawing its own inferences, the expert's ultimate issue testimony is not helpful and should be
 26 excluded.”).

27 Moreover, expert testimony consisting of legal conclusions regarding “the parties’
 28 [F]RAND obligations and duties is solely within the province of the court.” *Microsoft*, 2013 WL

1 4008822, at *20; *see also Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443,
 2 447 (9th Cir. 1992) (upholding district court's determination that expert testimony relating to
 3 contract interpretation would be "utterly unhelpful" and inadmissible).

4 **III. THE COURT SHOULD EXCLUDE DR. KAKAES' FLAWED OPINIONS**

5 ASUS accuses InterDigital of offering licenses to its SEPs that do not comply with
 6 InterDigital's FRAND commitments. To establish what it believes a FRAND offer from
 7 InterDigital should be, ASUS advances [REDACTED]

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED] *See* Ex. 4 ¶¶ 206-215.

12 In support of this [REDACTED] approach, ASUS economic expert Dr. Leonard relies on [REDACTED]

13 [REDACTED]
 14 [REDACTED] Ex. 4 ¶ 63 and Table 2. However, Dr. Kakaes' opinions regarding
 15 [REDACTED] as well as his opinions regarding [REDACTED]
 16 [REDACTED] should be excluded.

17 **A. Dr. Kakaes Offers Fatally Flawed Opinions on Two Topics**

18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED] is a company
 21 based in India that provides consulting services, including patent review services. [REDACTED]

22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 _____
 27 ² [REDACTED]
 28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In sum,

Dr. Kakaes did not make any of the determinations that are reflected in the [REDACTED]

[REDACTED] analysis, did not derive any of the results of the [REDACTED] analysis,

and did not lead or supervise a large portion of the work that led to those results. [REDACTED]

[REDACTED] Ex. 1 ¶¶ 180-190. However, Dr. Kakaes

did not keep a record of the patents he reviewed, nor did he set forth anywhere the results of his

own [REDACTED] analysis [REDACTED]

[REDACTED]

Dr. Kakaes' opinions about [REDACTED]

[REDACTED], and they are nevertheless likewise excludable. [REDACTED]

[REDACTED]

although court proceedings are not a subject matter within his claimed area of expertise. [REDACTED]

[REDACTED]

[REDACTED] but presents no substantive analysis

whatsoever of that review— [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Both of Dr. Kakaes’ Opinions Are Unreliable and Should Be Excluded

1. Dr. Kakaes’ Opinions on [REDACTED] Lack Foundation and Are Unreliable

Dr. Kakaes’ opinions related to [REDACTED]

[REDACTED] are inadmissible because:

(1) [REDACTED] (2) [REDACTED] methodology is not reproducible; and (3) the basis and reasons for [REDACTED] and Dr. Kakaes’ analyses have not been provided. Each of these problems alone provides a basis to exclude Dr. Kakaes’ opinions; taken together, they more than warrant exclusion. *Cf. In re Roundup*, 2018 WL 3368534, at *31 (excluding expert’s opinion where each problem was insufficient on its own to justify exclusion but, in combination, “the problems . . . le[d] the Court to conclude that his opinion is not sufficiently reliable to be admissible.”).

a) Dr. Kakaes did not perform the [REDACTED] analysis and did not supervise much of [REDACTED] work.

Not only did Dr. Kakaes fail to include in his report his own analysis of [REDACTED]

[REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] Because an expert must “apply *his* knowledge to the facts and form *his* own opinion,”
 5 *Abrams v. Ciba Specialty Chemicals Corp.*, No. 08-cv-0068-WS-B., 2010 WL 779283, at *4 (S.D.
 6 Ala. Mar. 2, 2010) (emphasis added), this is improper. In effect, Dr. Kakaes is merely serving as
 7 a “mouthpiece” for [REDACTED] with respect to [REDACTED] *Cholakyan v. Mercedes-Benz USA,*
 8 *LLC*, 281 F.R.D. 534, 547 (C.D. Cal. 2012), leaving the Court no opportunity to review the
 9 methodology or the reliability of [REDACTED] work.⁴ *Karum Holdings LLC v. Lowe’s Cos.*, No. 15 C
 10 380, 2017 U.S. Dist. LEXIS 192269, at *15-16 (N.D. Ill. Nov. 21, 2017) (excluding expert
 11 testimony on a damages model where the model was not built or supervised by the expert).

12 ASUS cannot argue that [REDACTED] results can be attributed to Dr. Kakaes because [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED] Ex. 1 ¶¶ 180-190. However, Dr. Kakaes did not
 16 keep a record of the patents he reviewed, nor did he set forth anywhere the results of his own
 17 analysis of [REDACTED] He should not be allowed to rely upon [REDACTED] judgment rather
 18 than setting forth his own. *Abrams*, 2010 WL 779283, at *4; *Cholakyan*, 281 F.R.D. at 546.

19 Further, ASUS cannot argue that [REDACTED] opinions can be attributed to Dr. Kakaes
 20 because [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED].

25
 26 ⁴ Indeed, ASUS did not proffer the [REDACTED] reviewers as experts: ASUS did not disclose the
 27 [REDACTED] reviewers as expert witnesses who would testify at trial (Fed. R. Civ. P. 26(a)(2)(A)) and
 28 did not provide expert reports from them (Fed. R. Civ. P. 26(a)(2)(B)). ASUS did not establish
 that the [REDACTED] reviewers are sufficiently qualified in the relevant fields to act as experts.

Dr. Kakaes improperly seeks to serve as a “mouthpiece” for those experts, shielding them from cross-examination or critical analysis. *Cholakyan*, 281 F.R.D. at 547; *Eveler v. Ford Motor Co.*, No. 16-14776, 2017 WL 3382460, at *9 (E.D. La. Aug. 7, 2017); *K&N Eng’g, Inc. v. Spectre Performance*, No. EDCV 09-1900VAP (DTBx), 2011 WL 13131157, at *10 (C.D. Cal. May 12, 2011).

The numbers Dr. Kakaes presents in his report purporting to set forth [REDACTED] are likewise not his own.

Again, Dr. Kakaes is improperly serving as the “mouthpiece” of others. *Cholakyan*, 281 F.R.D. at 547.

b) [REDACTED] essentiality analysis is un-reproducible.

The lack of reproducibility of the essentiality analysis is an independent ground to exclude Dr. Kakaes’ opinions. The opinions [REDACTED] are inconsistent from one case to another. These inconsistent results are an indicator of unreliability. *See United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (“Inconsistent results may be an indicator of unreliability”) (citing *Daubert*, 509 U.S. at 590 n.9)).

The reviewers at [REDACTED] previously conducted a patent census and performed an essentiality analysis for a different case, *TCL Commc’n Tech. Holdings, Ltd., et al. v. Telefonaktiebolaget LM Ericsson, et al.*, Case No. 8:14-cv-00341 (C.D. Cal.). [REDACTED]

That work was partly supervised by Dr. Kakaes and partly by another expert, Dr. Ding. Ex. 9 ¶ 312. [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED] These inconsistencies illustrate the highly subjective nature of the
 8 inquiry regarding essentiality, as well as the un-reproducibility, and thus unreliability, of [REDACTED]
 9 analysis here.⁵

10 c) *Dr. Kakaes fails to provide “the basis and reasons” for his [REDACTED]*
 11 *[REDACTED] opinions as well as [REDACTED],*
 12 *as required by Rule 26(a)(2)(B)(i).*

12 Another independent ground on which the Court should exclude Dr. Kakaes’ opinions on
 13 [REDACTED] is his failure to provide “the basis
 14 and reasons for” the opinions. “Bald conclusions of an expert witness, or brief statements of
 15 ultimate conclusions with no explanation of the basis and reasons therefore, or the absence of a
 16 statement of how the facts support the conclusions, do not satisfy the Rule 26(a)(2)(B)
 17 requirements.” *Wilderness Dev., LLC v. Hash*, No. CV 08-54-M-JCL., 2009 WL 564224, at *5
 18 (D. Mont. Mar. 5, 2009) (citations omitted). [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

24 _____
 25 ⁵ In *TCL v. Ericsson*, Dr. Kakaes attempted to explain these discrepancies by asserting that
 26 they were caused by “information asymmetry” because he and Dr. Jayant considered different
 27 standards than Concur and considered the patent file histories whereas Concur did not. Ex. 9
 28 ¶¶ 345-348. [REDACTED]

[REDACTED] The proper approach
 to remedying an information asymmetry is not to ignore relevant information, as Dr. Kakaes
 appears to have done here.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] Compliance with Federal Rule of Civil Procedure 26 would have
5 required [REDACTED] to provide the reasons it reached the conclusions it did *somewhere*, [REDACTED]
6 [REDACTED] But that did not happen.
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] absolutely no basis or reasoning has been
10 provided for [REDACTED] In the absence of any basis,
11 it is not clear that these patents were reviewed at all.

12 As for Dr. Kakaes' [REDACTED]⁶ Dr. Kakaes notably never disclosed the analysis or
13 result of any assessment regarding essentiality that he did for a single patent—[REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] As such, any opinions that Dr. Kakaes may provide at trial
18 regarding likely essentiality would be made without personal knowledge. Because the Court
19 cannot “see the mechanisms in order to determine if they are reliable and helpful,” Dr. Kakaes’

20 _____
21 ⁶ [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 ⁷ [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 opinions should be excluded. *See Lawrence v. Raymond Corp.*, No. 09-cv-1067, 2011 U.S. Dist.
 2 LEXIS 85798, at *20 (N.D. Ohio Aug. 4, 2011), *aff'd*, 501 F. App'x 515 (6th Cir. 2012).⁸

3 **2. Dr. Kakaes' Opinions Regarding [REDACTED]**
 4 **[REDACTED] Lack Basis and Are Unreliable**

5 In his second set of opinions, Dr. Kakaes opines [REDACTED]
 6 [REDACTED] Like his first set of opinions, these
 7 opinions lack reliability and are without basis. [REDACTED]

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED] Dr. Kakaes does not, however, establish that
 14 these [REDACTED] patents are representative of InterDigital's portfolio of likely essential patents.

15 Dr. Kakaes' failure to include any statistical analysis or any explanation of how it was
 16 statistically meaningful to extrapolate an opinion from his review of [REDACTED]
 17 [REDACTED] makes his opinions about InterDigital's patents unreliable. *See*
 18 *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1337 (11th Cir. 2010) (affirming exclusion of expert's
 19 reliance on a study where, among other things, the "district court concluded that . . . the study
 20 was unreliable because it did not include any statistical analysis and did not explain whether it
 21 was statistically meaningful to extrapolate from such a small sample size").

22 In addition, because Dr. Kakaes did not look at similar data points (*e.g.*, litigation history,
 23 claim charts, or patent contributions) for any other patent owners to compare them against
 24

25 ⁸ While an expert may rely on hearsay evidence, an expert may not be a conduit for
 26 inadmissible hearsay. *Shafi*, 2018 WL 3159769, at *5. "Hearsay is an out-of-court statement
 27 offered for the truth of the matter asserted." *United States v. Johnson*, 875 F.3d 1265, 1278 (9th
 28 Cir. 2017). [REDACTED] are inadmissible
 hearsay because they are being proffered to prove [REDACTED]
 [REDACTED] and do not fall under any of the hearsay exceptions.

1 InterDigital's, his conclusion [REDACTED] lacks any foundation.
 2 *Ipse dixit* conclusions can create "too great an analytical gap between the data and the opinion
 3 proffered." *See Joiner*, 522 U.S. at 146. [REDACTED]
 4 [REDACTED]

5 [REDACTED] Without reviewing the litigation history of other patent owners who have asserted likely
 6 essential patents, no conclusion can be made as to the relative quality of InterDigital's previously
 7 litigated patents in comparison to other patent owners. Similarly, without performing any
 8 analysis of other patent owner's patents discussed in licensing negotiations, he cannot draw any
 9 conclusion as to the relative "quality" of InterDigital's patents. Finally, without performing any
 10 analysis of other patent owner's contributions to standard setting organizations, he likewise
 11 cannot draw any conclusion about InterDigital's relative contributions. Dr. Kakaes has done
 12 nothing to support or substantiate his [REDACTED]

13 [REDACTED] Dr. Kakaes' "[p]ersonal opinion, not science, is testifying here." *Daubert v.*
 14 *Merrell Dow Pharms.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (quoting *Turpin v. Merrell Dow*
 15 *Pharms., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992)).

16 This is not the first time Dr. Kakaes has proffered one-sided and incomplete comparisons.
 17 In *TCL v. Ericsson*, the court found that Dr. Kakaes' opinions regarding the importance and
 18 contribution of Ericsson's proportional share of likely essential patents were not helpful because
 19 TCL's expert—Dr. Kakaes—had not reviewed any other patent owner's likely essential patents
 20 and had not considered whether anyone else owned the alleged alternative that he asserted could
 21 have been adopted into the standard. Ex. 10 at 41-42 (*TCL v. Ericsson*, Slip op., Case No. 8:14-
 22 cv-00341 (C.D. Cal. Sept. 14, 2018)). The district court in *TCL* also found Dr. Kakaes'
 23 discussion of Ericsson's patent contributions lacking because he had not analyzed "whether
 24 alternatives are mutually inconsistent with each other, would perform worse than the standard,
 25 would even create a viable, functional standard, or require other patents owned by Ericsson (thus
 26 defeating the point of the analysis)." *Id.* at 41. This is the case here as well. Dr. Kakaes has not
 27 considered InterDigital's contributions in the proper context. [REDACTED]
 28 [REDACTED]

1 [REDACTED]
 2 [REDACTED] Thus, he repeated the same
 3 errors as he committed in *TCL*.

4 **IV. THE COURT SHOULD EXCLUDE DR. SCOTT MORTON'S IMPROPER**
 5 **LEGAL OPINIONS**

6 In support of its breach of contract claims, ASUS alleges that [REDACTED]
 7 [REDACTED]
 8 [REDACTED]

8 [REDACTED] Additionally,
 9 ASUS claims that InterDigital has unlawfully used its alleged monopoly power in the “Cellular
 10 Markets” to cause harm to ASUS and to competition in violation of Section 2 of the Sherman
 11 Act. *See id.* ¶¶ 13-14; FAC ¶¶ 72-85.

12 ASUS retained Dr. Scott Morton to provide expert opinions concerning, among other
 13 things: (1) [REDACTED] (2) whether InterDigital has violated
 14 the “fair” and “reasonable” components of InterDigital’s FRAND commitments to ETSI;
 15 (3) whether InterDigital has discriminated against ASUS in violation of its FRAND
 16 commitments to ETSI; (4) whether ASUS is a “willing licensee”; (5) whether InterDigital has
 17 acquired monopoly power in the Cellular Technology Markets; (6) whether InterDigital’s
 18 conduct has caused anticompetitive harm to ASUS and to consumers; and (7) [REDACTED]
 19 [REDACTED] *See Ex. 2* ¶¶ 16-17. With respect to each of these
 20 subject areas, Dr. Scott Morton offers improper legal conclusions that warrant exclusion under
 21 Rule 702.

22 **A. Dr. Scott Morton’s Legal Conclusions Regarding ASUS’s Breach of Contract**
 23 **Claims Should Be Excluded**

24 ASUS claims that InterDigital has violated its ETSI FRAND obligations with respect to
 25 the 2008 PLA and subsequent licensing offers made to ASUS. Specifically, ASUS alleges that
 26 InterDigital has imposed and demanded “supra-competitive royalties” that are not FRAND. *See*
 27 FAC ¶¶ 50, 97, 105. Dr. Scott Morton offered two expert reports that set out her views on these
 28

1 questions. As discussed below, certain aspects of Dr. Scott Morton's proposed testimony are
2 inadmissible under Rule 702.

3 First, Dr. Scott Morton's opinions regarding [REDACTED]
4 [REDACTED] should be
5 excluded as improper legal conclusions. *See Microsoft*, 2013 WL 4008822, at *14 (expert
6 witnesses "must be prohibited from opining on the interpretation of the RAND obligation vis-à-
7 vis the rights and obligations of the SEP holder and implementer"). Here, Dr. Scott Morton
8 opines [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] Because "there is little question that statements by an
14 expert witness as to the circumstances under which a patent holder fulfills its RAND obligation
15 is beyond the scope of permissible expert testimony," *Microsoft*, 2013 WL 4008822, at *14,
16 these opinions should be excluded.

17 Second, Dr. Scott Morton further concludes that InterDigital has violated the "fair" and
18 "reasonable" components of its ETSI FRAND commitments. Specifically, [REDACTED]
19 [REDACTED]
20 [REDACTED] Such testimony is improper,
21 as opinions concerning whether InterDigital has complied with its FRAND commitments
22 constitute legal conclusions. *See Microsoft*, 2013 WL 4008822, at *15 (excluding testimony
23 regarding whether Motorola met its RAND obligations because it "assumes the law and the
24 parties' obligations or touches on what the law should be"). Moreover, these opinions should be
25 excluded because they address ultimate issues. Because the jury is capable of determining
26 whether the 2008 PLA and InterDigital's offers were "fair" and "reasonable," Dr. Scott Morton's
27 proposed testimony which purports to make that determination would not be helpful to the jury.
28 *See id.* at *12.

1 *Third,* [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 Like her proposed testimony concerning whether InterDigital violated the fair and reasonable
 5 components of its FRAND obligations, Dr. Scott Morton's legal conclusion that the terms in the
 6 2008 PLA and subsequent offers from InterDigital are discriminatory goes to an ultimate issue in
 7 the case, would not be helpful to the jury, and should be excluded.

8 *Fourth,* in support of ASUS's affirmative claim that it is a "willing licensee," Dr. Scott
 9 Morton opines that ASUS [REDACTED]

10 [REDACTED] Whether ASUS has been
 11 a "willing licensee" during the course of its license negotiations with InterDigital presents
 12 another ultimate issue. Because, [REDACTED]
 13 [REDACTED], determining whether ASUS
 14 has behaved as a willing licensee is intertwined with its FRAND-related claims. It is
 15 inappropriate for an expert to offer a legal conclusion on this ultimate issue, which the jury is
 16 capable of deciding; it is the role of the jury to evaluate the evidence concerning ASUS's
 17 negotiating conduct and conclude whether it is a willing licensee with respect to InterDigital's
 18 SEPs.

19 **B. Dr. Scott Morton's Legal Conclusions Regarding ASUS's Sherman Act Claim**
 20 **Should Be Excluded**

21 In support of its claim that InterDigital's conduct violates Section 2 of the Sherman Act,
 22 ASUS argues that InterDigital has acquired and maintained monopoly power in the Cellular
 23 Technology Markets, abused that alleged monopoly power, and caused harm to ASUS and to
 24 competition as a result. *See* FAC ¶¶ 72-85. In addition to offering improper legal conclusions
 25 on these very issues, Dr. Scott Morton also advances the highly inappropriate opinion that
 26 [REDACTED]

27 Dr. Scott Morton's legal opinions concerning InterDigital's alleged acquisition,
 28 maintenance, and abuse of monopoly power in the Cellular Technology Markets are improper, as

1 such opinions comprise legal conclusions regarding elements of a Sherman Act claim and thus
 2 usurp the role of the jury. *See, e.g., id.* ¶¶ 114, 174. Throughout her reports, Dr. Scott Morton
 3 additionally offers conclusory legal opinions concerning specific alleged conduct by InterDigital,

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED] Such statements also relate to ultimate issues for the jury, and
 7 should be excluded here.

8 Similarly, Dr. Scott Morton's legal conclusions concerning whether InterDigital's alleged
 9 conduct caused anticompetitive harm to ASUS and to consumers constitute improper expert
 10 testimony. *See, e.g., id.* ¶¶ 25, 238. In particular, her proposed testimony on whether
 11 InterDigital's alleged conduct *caused* any injury (to ASUS or competition generally) lacks
 12 foundation and usurps the role of the jury, as it concerns a factual question on an ultimate issue.
 13 *See In re W. Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973) ("the problems of damages
 14 and causation are questions of fact for the jury"); *Pac. Shores Props., Ltd. Liab. Co. v. City of*
 15 *Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013) ("Causation is an intensely factual question
 16 that should typically be resolved by a jury").

17 Finally, Dr. Scott Morton's legal conclusion that [REDACTED]
 18 [REDACTED] is especially improper and should be
 19 excluded. *Id.* ¶ 26. *See Arista Networks, Inc. v. Cisco Sys. Inc.*, Case 5:16-cv-00923-BLF, Dkt.
 20 334 at 9 (N.D. Cal. June 15, 2018) (excluding expert opinions concerning "whether antitrust laws
 21 should prohibit specific conduct").

22 **V. THE COURT SHOULD EXCLUDE DR. LEONARD'S IMPROPER LEGAL** 23 **OPINIONS**

24 Like Dr. Scott Morton, Dr. Leonard offers improper legal opinions that are inadmissible
 25 under Rule 702. Throughout his Opening Report, Dr. Leonard opines on [REDACTED]
 26 [REDACTED] *See Microsoft*, 2013 WL 4008822, at *14
 27 (prohibiting expert testimony relating to "the interpretation of the RAND obligation"). For
 28 example, Dr. Leonard opines that a [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] Such opinions regarding what comprises FRAND terms and conditions
4 are improper because they purport to explain how the law should be applied, an inappropriate
5 subject for expert testimony.

6 Indeed, in *Microsoft Corporation v. Motorola, Inc.*, the district court granted a motion to
7 exclude similar testimony offered by Dr. Leonard. *See Microsoft*, 2013 WL 4008822, at *22
8 (finding Dr. Leonard's testimony regarding what RAND requires of SEP owners to be
9 inadmissible legal conclusions). The court went on to explain that "through its jury instructions,"
10 the court would "determine[] the rights and obligations of the parties under the RAND
11 commitment," and that "Dr. Leonard or any other witness must be prohibited from opining on
12 the interpretation of the RAND obligation vis-à-vis the rights and obligations of the SEP holder
13 and implementer." *Id.*

14 Additionally, [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] These legal
21 conclusions, under the guise of economic expert opinions,⁹ should similarly be excluded.

22 Dr. Leonard also attempts to apply his version of the law to the facts of the case, offering
23 specific legal conclusions regarding InterDigital's alleged conduct. In both his Opening Report
24 and Second Supplemental Report, Dr. Leonard concludes that [REDACTED]
25 [REDACTED]

26 _____
27 ⁹ [REDACTED]
28 [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED] These legal conclusions should also be excluded.

Finally, Dr. Leonard offers the legal conclusion that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] These legal

conclusions not only lack foundation, they also constitute inadmissible expert testimony and

should be excluded.

/ / /